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No.

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

JOSEPH S. COCHRAN AND BRENDA S. COCHRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether advertising under the Dairy Promotion and Research Program (Dairy Program), 7 U.S.C. 4501 *et seq.*, and the Dairy Promotion and Research Order (Dairy Order), 7 C.F.R. Pt. 1150, constitutes government speech that may be funded through assessments on milk producers without violating the First Amendment.

2. Whether advertising under the Dairy Program and the Dairy Order satisfies intermediate scrutiny.

3. Whether advertising under the Dairy Program and the Dairy Order is ancillary to a broader regulatory scheme and is therefore constitutional under *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Secretary of the United States Department of Agriculture and the National Dairy Promotion Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 359 F.3d 263. The opinion of the district court (App., *infra*, 35a-53a) is reported at 252 F. Supp. 2d 126.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2004. A petition for rehearing was denied

on May 3, 2004 (App., *infra*, 54a-55a). On July 21, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including September 1, 2004. On August 23, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including September 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The relevant provisions of the Dairy Production Stabilization Act of 1983 (Dairy Act or Dairy Program), Pub. L. No 98-180, Tit. I, 97 Stat. 1136 (7 U.S.C. 4501 *et seq.*), are reproduced at App., *infra*, 56a-89a. The Dairy Promotion and Research Order, 7 C.F.R. Pt. 1150, is reproduced at App., *infra*, 90a-119a.

STATEMENT

This case involves a First Amendment challenge to the Dairy Program, 7 U.S.C. 4501 *et seq.*, which imposes assessments on milk producers to fund generic advertising of dairy products. The district court held that the Dairy Program is ancillary to a broader scheme that regulates the market for dairy products and is therefore constitutional under *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals, however, held that the Dairy Program violates the First Amendment, rejecting arguments that the program is valid under the government speech doctrine, intermediate scrutiny, and the ancillary regulation analysis of *Wileman Brothers*.

1. a. Federal regulation is "deeply imbedded in the economic fabric of the United States dairy industr[y]." S. Rep. No. 163, 98th Cong., 1st Sess. 13 (1983). Because market conditions have been unstable and have depressed prices, Congress long ago established four interrelated programs to "deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes." *Ibid.* First, milk marketing orders set prices that fluid milk processors, proprietary milk plants, and other handlers of milk must pay to dairy producers. 7 U.S.C. 608c (2000 & Supp. I 2001). The orders establish "minimum prices for fluid grade milk in most parts of the country." S. Rep. No. 163, *supra*, at 13; see *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59, 61 (2003). Second, the dairy price support program authorizes the Secretary of Agriculture to purchase dairy products at announced prices. 7 U.S.C. 1446. That program "explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices." S. Rep. No. 163, *supra*, at 13. Third, import controls "protect the price support program and keep the U.S. Government from supporting world milk prices." *Ibid.* See 19 U.S.C. 1202. Fourth, federal law authorizes milk producers to market their products through cooperative associations without violating the antitrust laws. S. Rep. No. 163, *supra*, at 13. See 7 U.S.C. 291.

For many years, that system of regulation succeeded in "providing adequate supplies of wholesome and nutritious fluid milk and dairy products at reasonable prices to the consumer and at minimum cost to the taxpayer." S. Rep. No. 163, *supra*, at 13. By 1983, however, milk production "far outpace[d] demand, leaving the Government to purchase unacceptable and increasing amounts of surplus dairy products." *Ibid.*

Moreover, "[b]y guaranteeing a market for all dairy production," the government had reduced "the incentive for the industry to go through the expense of promoting [its] product." *Id.* at 14. Attempts at voluntary programs had traditionally failed, because not all who benefit from the generic promotion efforts were willing to pay for the program. As a result, advertising expenditure for milk lagged behind those for competing brand-differentiated products, such as soft drinks, fruit juices, coffee, and tea. *Id.* at 14-15.

b. Congress responded to the problem by enacting the Dairy Production Stabilization Act of 1983, Pub. L. No. 98-180, Tit. I, 97 Stat. 1136 (7 U.S.C. 4501 *et seq.*). In that Act, Congress reduced price support for dairy products, established a temporary program of incentive payments to producers who reduced production, and created the Dairy Program at issue here. S. Rep. No. 163, *supra*, at 16-20.

The Dairy Program is "a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." 7 U.S.C. 4501(b). Congress specified that the promotion program would be financed through "assessments on all milk produced in the United States for commercial use." 7 U.S.C. 4501(b). Congress thereby sought to ensure that "all farmers" would help "to increase commercial sales and thus reduce Government purchases." S. Rep. No. 163, *supra*, at 19. The Dairy Program rests on findings that "the production of dairy products plays a significant role in the Nation's economy," that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the main-

tenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation." 7 U.S.C. 4501(a)(2)-(4).

The Dairy Act provides for the establishment of plans and projects for "promotion of the sale and consumption of dairy products." 7 U.S.C. 4504(a). The Act defines "promotion" as "actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products." 7 U.S.C. 4502(i).

The Dairy Act directs the Secretary to promulgate an order to implement the Dairy Program, 7 U.S.C. 4503(a), and to conduct a referendum among milk producers on its continuation. 7 U.S.C. 4506(a). In 1984, the Secretary promulgated the Dairy Promotion and Research Order (Dairy Order), 49 Fed. Reg. 11,806, and in a referendum conducted in 1985, more than 89% of milk producers approved the order. C.A. App. 115. The Dairy Act authorizes the Secretary to conduct subsequent referenda on the continuation of the program when at least ten percent of milk producers request one. In a referendum conducted in 1993, more than 70% of milk producers favored continuation of the program. *Ibid.* In addition to the referendum mechanism, the Secretary may terminate or suspend the program upon a finding that it "does not tend to effectuate" the program's purposes. 7 U.S.C. 4507(a).

c. The Dairy Act establishes an entity to administer the Dairy Program—the National Dairy Promotion and Research Board (Dairy Board). 7 U.S.C. 4504(b). The Dairy Board consists of 36 members, each of whom must be a milk producer. 7 U.S.C. 4504(b). The Secretary appoints the members based on nominations sub-

mitted by milk producer organizations. 7 U.S.C. 4504(b). The Secretary fills Dairy Board vacancies "occasioned by the death, removal, resignation, or disqualification of any member." 7 C.F.R. 1150.136. The terms of Board members are staggered. 7 C.F.R. 1150.132(a).

The Dairy Board is authorized to develop and budget for plans for the promotion of dairy products, administer the Dairy Order, adopt rules and regulations, investigate possible violations of the Order, and recommend amendments to the Order. 7 U.S.C. 4504(c). The Dairy Board is prohibited from using money from assessments to influence government policy or action, with the exception of recommending amendments to the Order. 7 U.S.C. 4504(j).

The Dairy Board has assigned much of the day-to-day administration of the Dairy Program to Dairy Management, Inc. (DMI), a District of Columbia corporation. App., *infra*, 12a. DMI's Board of Directors consists of members of the Dairy Board and the United Dairy Industry Association (UDIA), a federation of state or regional dairy programs. All plans and budgets of DMI must be approved by the Dairy Board. *Ibid.*

d. By statutory directive, the Dairy Board's activities are funded through an assessment of 15 cents for each hundredweight of milk produced in the 48 contiguous States for commercial use. 7 U.S.C. 4504(g); 7 C.F.R. 1150.152(a) and (b). A producer who contributes to a "State or regional dairy product promotion, research or nutrition education program" certified by the Secretary as a "Qualified Program" is entitled to a credit of up to 10 cents per hundredweight against the amount that he or she would otherwise owe to the Dairy Board. 7 C.F.R. 1150.153(a), 1150.152(c).

e. The Secretary exercises comprehensive control over the activities of the Dairy Board. The Secretary

must approve the Board's annual budget, 7 U.S.C. 4504(e); she must approve any promotion project before it may become effective, 7 U.S.C. 4504(d); and she may inspect and audit the Board's books and records at any time. 7 U.S.C. 4504(h). United States Department of Agriculture officials participate actively in the development of advertising projects and, on occasion, have required the Dairy Board to alter its advertising proposals prior to approval. C.A. App. 61.

f. The Dairy Program has been in operation for approximately 20 years. Advertising under the program has included the well-known "Got Milk?" campaign. App., *infra*, 14a.

2. Respondents operate a dairy farm in Tioga County, Pennsylvania, where they produce milk for commercial use. App., *infra*, 3a. They filed suit in federal court against the Secretary and the Dairy Board, alleging that the Dairy Program violates their First Amendment rights. *Id.* at 3a-4a. Respondents sought an injunction to prevent collection of any assessments under the Dairy Program. *Id.* at 4a.

Relying on *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), and *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), the district court sustained the constitutionality of the Dairy Program. App., *infra*, 35a-53a. The court reasoned that, as in *Wileman Brothers*, the assessments for advertising are part of a larger regulatory scheme that restricts market autonomy. *Id.* at 48a-49a.

3. The court of appeals reversed. App., *infra*, 1a-34a. First, the court held that advertising under the Dairy Program is not "government speech" that is immune from scrutiny under the First Amendment. *Id.* at 17a-20a. Relying on its holding in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493

U.S. 1094 (1990), that the Beef Promotion and Research Act (Beef Act), 7 U.S.C. 2901 *et seq.*, does not involve government speech, the court held that "the Secretary's supervisory responsibilities are not sufficient to transform the dairy industry's self-help program into 'government speech.'" Pet. App. at 19a.

The court of appeals next held, in reliance on *United Foods*, that the Dairy Program could not be sustained under the analysis in *Wileman Brothers*. App., *infra*, 20a-24a. The court reasoned that *United Foods* limited *Wileman Brothers* to circumstances where "individuals are 'bound together' in a collective enterprise, such as a union or an integrated state bar," *id.* at 21a, and that "there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar or the collective enterprise at issue in [*Wileman Brothers*]." *Id.* at 22a. The court further reasoned that the Dairy Program "is a free-standing promotional program" and is not "ancillary" to a larger regulatory scheme having non-speech purposes. *Ibid.*

Finally, the court held that the governmental interests furthered by the Dairy Program are insufficient to justify compelled assessments. App., *infra*, 24a-31a. The court reasoned that *United Foods* establishes that the government's interest in increasing demand for a product is insufficient to justify compelled assessments. *Id.* at 29a. The court concluded that the government's interest in reducing its price support obligations does not justify the assessments because, in the court's view, the Dairy Program does not operate in conjunction with the price support program. *Ibid.*

REASONS FOR GRANTING THE PETITION

A. This Case Presents The Same Government Speech And Intermediate Scrutiny Questions That Are Presented In *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164, And *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Ass'n*, No. 03-1165

In *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164, and *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Ass'n*, No. 03-1165, this Court granted certiorari to decide whether the Beef Act, 7 U.S.C. 2901 *et seq.*, violates the First Amendment insofar as it requires cattle producers and importers to fund generic advertising promoting the desirability of eating beef. For reasons set forth in the government's brief in those consolidated cases, the Beef Act does not violate the First Amendment. That Act is constitutional because it establishes a program of government speech that is immune from First Amendment scrutiny and because it satisfies intermediate scrutiny. See Gov't Br. at 14-42, *Veneman* v. *Livestock Marketing Ass'n*, cert. granted, 124 S. Ct. 2389 (2004) (No. 03-1164).

For the same reasons, the Dairy Program is constitutional, and the court of appeals in this case erred in holding otherwise. The characteristics that make advertising under the Beef Act government speech are also present in the Dairy Program. Congress itself has specified the central message to be disseminated—that it is desirable to consume dairy products. 7 U.S.C. 4502(i). Congress has created a special entity—the Dairy Board—to administer the program. 7 U.S.C. 4504(b). And Congress has entrusted to the Secretary of Agriculture ultimate control over the content of advertising. 7 U.S.C. 4504(d).

Similarly, like the Beef Act, the Dairy Program satisfies intermediate scrutiny. It serves important interests: enhancing the welfare of an important sector of the economy, stabilizing the general economy, and ensuring adequate nourishment. 7 U.S.C. 4501(a)(2)-(5). It directly serves those interests because it stimulates demand for dairy products and eliminates the collective action/free rider problem that otherwise prevents significant generic advertising from occurring. And it is carefully tailored to achieve those objectives because it requires only that producers contribute financially to advertising that promotes the very product they have chosen to market.

Because this case presents the same government speech and intermediate scrutiny questions that are presented in the *Livestock Marketing* cases, this case should be held pending the decision in those consolidated cases. The government recommended that the Court hold the government's petition in *Veneman* v. *Campaign for Family Farms*, No. 03-1180, pending the Court's decision in the *Livestock Marketing* cases because *Campaign for Family Farms* involves the same government speech and intermediate scrutiny issues in the context of the Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.* There is no reason for the Court to follow a different course here.

B. The Dairy Program Is Constitutional Under *Wileman Brothers*

If the Court reverses the judgment in *Livestock Marketing*, it should then vacate the court of appeals' judgment in this case and remand for reconsideration in light of that decision. If the Court affirms the judgment in *Livestock Marketing*, however, it should either grant

the petition in this case to decide whether the Dairy Program is constitutional under the ancillary regulation analysis of *Wileman Brothers*, or vacate the court of appeals' judgment for further consideration. The court of appeals erred in holding that the Dairy Program cannot be sustained under the ancillary regulation analysis of *Wileman Brothers*. The court's *Wileman Brothers* analysis conflicts with that of two other circuits. The question of *Wileman Brothers*' applicability to the Dairy Program is an important one. And that question would not be resolved by an affirmance in *Livestock Marketing*.

1. a. In *Wileman Brothers*, the Court held that a program that relied on assessments to fund generic advertising of California peaches and nectarines involved "a question of economic policy for Congress and the Executive to resolve," not "a First Amendment issue for [the Court] to resolve." 521 U.S. at 468. The Court explained that "California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws," and that "[t]he business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469.

In *United Foods*, the Court held that assessments imposed on mushroom producers to fund generic advertising of mushrooms could not be sustained under the rationale of *Wileman Brothers*. The Court explained that, in contrast to the program upheld in *Wileman Brothers* where the advertising was "part of a

far broader regulatory system that does not principally concern speech, * * * there is no broader regulatory system in place here." 533 U.S. at 415. Instead, the only program that the compelled contributions served was "the very advertising scheme in question." *Ibid.* Because the mushroom advertising program was not "germane" to a regulatory program "independent from the speech itself," it could not be sustained under *Wileman Brothers*. *Ibid.*

b. Like the fruit tree program at issue in *Wileman Brothers*, and unlike the mushroom program at issue in *United Foods*, the Dairy Program is part of a broader regulatory system that is not principally concerned with speech. That system consists of several interrelated components. First, milk marketing orders set prices that processors, producer associations, and other handlers of milk must pay. 7 U.S.C. 608c (2000 & Supp. I 2001). Second, a dairy price support program authorizes the Secretary of Agriculture to purchase dairy products at announced prices. 7 U.S.C. 1446. Third, import controls establish annual import quotas on dairy products. 19 U.S.C. 1202; 7 C.F.R. Pt. 6, Apps. 1, 2, 3. And fourth, federal law authorizes milk producers to market their products through cooperative associations without violating the antitrust laws. 7 U.S.C. 291.

The Dairy Program was enacted against the backdrop of those interrelated programs, and it was one of three programs enacted simultaneously to address the deficiencies in the previous regulatory structure. Under the preexisting structure, milk production had begun to far outpace demand, forcing the government to purchase increasing amounts of surplus dairy products at taxpayer expense. S. Rep. No. 163, *supra*, at 13. The price support system had also further reduced

the incentive, which was already weak due to the collective action/free rider problem in funding generic advertising, for producers to advertise to increase consumer demand. *Id.* at 14. To address those problems, Congress reduced the level of price support, provided a temporary incentive to reduce production, and established the Dairy Promotion Program. *Id.* at 16-20. Through those three measures, Congress sought to maintain dairy prices at acceptable levels, while reducing the government's obligation to purchases surplus dairy products. *Ibid.* By stimulating consumer demand, the Dairy Program plays a vital role in furthering that overall regulatory objective. *Id.* at 18. Because the Dairy Program is part of a broader system that regulates the market for dairy products and that is not principally concerned with speech, it is valid under *Wileman Brothers.*

c. The court of appeals rejected the government's reliance on *Wileman Brothers* in part because Congress has not required milk producers to join a collective association like a state bar or a labor union. App., *infra*, 21a-22a. But nothing in *Wileman Brothers* or *United Foods* suggests that *Wileman Brothers*' rationale is confined in that way. Rather, *Wileman Brothers*' rationale extends to all situations where an advertising program is a component of a broader regulatory structure that controls the market for a commodity and that is not principally concerned with speech. *United Foods*, 533 U.S. at 415; *Wileman Bros.*, 521 U.S. at 469.

The court of appeals also erred in characterizing the Dairy Promotion Program as "free-standing" and not "ancillary" to any broader regulatory system. App., *infra*, 22a. As discussed above, the promotion program is not a stand-alone program untethered to a larger regulatory scheme; it is an important component of a

larger regulatory system that is designed to stabilize prices for dairy products at acceptable levels without imposing an excessive burden on the government and taxpayers. Indeed, as explained above, the Dairy Program and several related measures were enacted in 1983 to remedy deficiencies in the overall regulation of dairy products.

The court of appeals' observation (App., *infra*, 22a) that the promotion program applies to all dairy farmers regardless of whether they are subject to marketing orders or other dairy regulation does not detract from the validity of the promotion program. Congress's system of marketing orders, price supports, import controls, and authorization of concerted action is designed to produce stable and acceptable price levels for the benefit of all producers of milk. Moreover, advertising of a generic product benefits all purveyors of the generic product. Congress therefore reasonably required all producers to contribute to the generic advertising component of that regulatory system.

Nor does it matter that marketing orders do not place obligations on producers. App., *infra*, 22a; see *id.* at 15a (citing 7 U.S.C. 608c(13)). Marketing orders expressly govern the price that handlers must pay to producers and thereby effectively control the prices that producers receive for their milk. 7 U.S.C. 608c(5). Producers therefore participate in a highly regulated market and, under *Wileman Brothers*, may be required to fund advertising that supports that market.

2. The court of appeals' *Wileman Brothers* analysis conflicts with the decisions of two other circuits. In *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 WL 137631 (Mar. 2, 1999) (173 F.3d 429), cert. denied, 528 U.S. 1074 (2000), the Sixth Circuit upheld the Dairy Promotion Program on the basis of *Wileman Brothers*.

The court rejected the contention that the Dairy Promotion Program is a "stand-alone program" and therefore distinguishable from the program at issue in *Wileman Brothers*. *Id.* at *4. The court explained that "federal regulation has permeated the dairy industry for more than fifty years," and that the promotion program is designed to "stimulate consumer demand for a highly regulated product." *Ibid.*

Similarly, in *Gallo Cattle Co.* v. *California Milk Advisory Board*, 185 F.3d 969 (1999), the Ninth Circuit upheld a state milk advertising program in reliance on *Wileman Brothers*. The court reasoned that "dairy farmers are compelled to fund the generic advertising . . . as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* at 975 (citation omitted). The court rejected the argument that *Wileman Brothers* is limited to situations in which a promotion order is a component of a marketing order. The court explained that "[o]f importance to the Court in *Wileman Brothers* was not whether all regulations were contained within a single marketing order, but rather the overall regulatory scheme." *Id.* at 974 n.5.

While *Nature's Dairy* and *Gallo* were decided before *United Foods*, both decisions are fully consistent with *United Food*'s clarification of the scope of *Wileman Brothers*. Both courts upheld the dairy promotion program at issue because it was a component of a larger regulatory scheme. The court of appeals' decision in this case conflicts with the analysis in those cases.

3. The question whether the Dairy Program is constitutional under *Wileman Brothers* is also an important one. That program has been in existence for approximately 20 years and has played an integral role in stabilizing an important sector of the national

economy. An appellate court decision invalidating an important and longstanding program established under an Act of Congress warrants this Court's review.

4. Even if the Court affirmed the judgment in *Livestock Marketing*, it would not resolve the *Wileman Brothers* question presented here. The government has not argued that the Beef Act is constitutional under *Wileman Brothers*. Private petitioners have raised a *Wileman Brothers* defense to the Beef Act. See Br. for Nebraska Cattlemen, Inc. at 47-50, *Livestock Marketing Ass'n*, *supra* (No. 03-1164). But in light of the differences in the nature and extent of the government's regulation of dairy products and its regulation of beef, a rejection of the *Wileman Brothers* defense in *Livestock Marketing* would not resolve the *Wileman Brothers* question presented here. Compare *id.* at 47-48, with pp. 12-13, *supra*. Indeed, government regulation of beef does not involve any of the elements of market regulation at issue here. *Ibid.*

Thus, if the Court reverses the judgment in *Livestock Marketing*, it should vacate the judgment in this case and remand for further consideration in light of that decision. But if it affirms the judgment in *Livestock Marketing*, it should grant the petition in this case limited to question three or vacate the judgment and remand for further consideration in light of the Court's decision in *Livestock Marketing*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164, and *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Ass'n*, No. 03-1165, and then dis-

posed of as appropriate in light of the decision in those consolidated cases.

Respectfully submitted.

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